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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

No. 814

ALF M. LANDON,
Petitioner,

vs.

NORTHERN NATURAL GAS COMPANY,
Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Upon the request of the court that he do so, the Solicitor General has filed a Memorandum for the Federal Power Commission as *Amicus Curiae*. The clerk of the court has advised the petitioner that he may file a reply thereto.

The Court on March 8, 1965, granted writs of certiorari to the United States Court of Appeals for the Fifth Circuit in No. 714, *Ocean Drilling Company and Exploration Company* v. *Federal Power Commission, et al.*; No. 671, *United Gas Improvement Co.* v. *Callery Properties, Inc.*; No. 678, *New York Public Service Commission* v. *Callery Properties, Inc.*; and in No. 756, *Federal Power Commission* v. *Callery Properties, Inc.* Each of these cases involves the question

of the validity of retroactive rate refund orders under the Natural Gas Act, and a determination of that issue may be dispositive of the instant case.[1]

Those cases arose out of the opinion of the Fifth Circuit in *Callery Properties, Inc.*, v. *Federal Power Commission*, 335 F.2d 1004 (1964), wherein, on pages 1018-1019, the Court below stated the principal objection to the retroactive rate refund orders there involved as follows:

> "The third, and serious, attack made by all is that the operative effect of the refund is that of a reparation order. Under the structure of the Act, it has long been recognized, and never questioned, that '* * * under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those "to be thereafter observed and enforced".' FPC v. Hope Natural Gas Co., 1944, 320 U.S. 591, 618, 64 S. Ct. 281, 88 L. Ed. 333.[53]
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> "53. Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 1951, 341 U.S. 246, 71 S. Ct. 692, 95 L. Ed. 912; Panhandle Eastern Pipe Line Co. v. FPC, 3 Cir., 1956, 236 F.2d 289, 292. The Supreme Court in T.I.M.E. v. United States, 1959, 359 U.S. 464, 469-470, 79 S. Ct. 904, 908, 3 L. Ed. 2d 952, has recently said of *Montana-Dakota*: '[I]t was held that the Federal Power Act, which like the Motor Carrier Act expressly declares unreasonable rates to be "unlawful", does not create a cause of action for the recovery of allegedly unreasonable past rates * * *'."

That, of course, is the gravamen of Landon's complaint here (Petition, pages 7-12). While those cases involve a direct appeal from retroactive rate refund orders predicated on subsequently invalidated certificates of public convenience and necessity, the instant petition presents an even clearer example of the operative effect of retroactive

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1. Similar questions are presented in No. 768, *J. R. Frankel et al.* v. *Federal Power Commission;* No. 769, *J. Ray McDermott & Co., Inc.*, v. *Federal Power Commission;* and No. 776, *The Superior Oil Company* v. *Federal Power Commission*, now pending petitions for writs of certiorari.

refund orders as reparations prohibited by the Natural Gas Act.

In the present case, after notice and hearing, the Federal Power Commission issued a permanent, unconditional certificate of public convenience and necessity to Landon at the eleven cent rate (R. 56-59; 16 FPC 1130), and accepted Landon's initial rate schedule filings at this level (R. 96-98). After these permanently certificated and uncontested rates had been in effect for more than four years, the pipeline purchaser brought a collateral action for refunds. Thus, the operative effect of the trial court's judgment is to set aside Landon's certificated rates on file with the Commission and to award the reparations proscribed by the Natural Gas Act.

These are important public questions in the administration of the Natural Gas Act. The Government stated its position in its Memorandum Brief in No. 714, *Ocean Drilling & Exploration Company* v. *Federal Power Commission,* at page 8:

> "Obviously, the question of the Commission's power to order refunds in the situation presented by this case is closely related to the question which we have raised as to the proper measure of the refund obligation. If the one is reviewed, it would seem clearly appropriate to review the other as well."

If, as contended in these other cases, the Commission has no power to order reparations within the framework of the Natural Gas Act, *a fortiori,* a District Court has no power in a collateral action to set aside permanently certificated rates filed under the Act, and thereby to frustrate the uniform administration of the Act, entrusted to the Commission. The decision of this court in the proceedings in which certiorari has previously been granted may

control and, in any event, will materially influence the disposition of the present case.

Since it now appears that the validity of retroactive rate refund orders will be reviewed and clarified by the Court, certiorari should be granted in this case and heard in conjunction with Nos. 714, 671, 678, and 756, so that the views of Petitioner may be presented in the factual context of this case. In any event, this petition should be held in abeyance pending disposition of the Fifth Circuit cases.

Respectfully submitted,

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